Badan Peguam Malaysia v Yang Berhormat Perdana Menteri Malaysia, Tan Sri Dato' Hj Mahiaddin bin Mohd Yasin & Anor

FEDERAL COURT (PUTRAJAYA) — LEAVE APPLICATION NO 08(i)-428–12 OF 2023(W)
ABANG ISKANDAR PCA
19 JUNE 2024

Civil Procedure — Appeal — Leave to appeal — Application for — Application for reference of constitutional questions to the Federal Court was dismissed — Whether questions of law fulfilled necessary threshold for grant of leave to appeal — Courts of Judicature Act 1964 ss 81, 84 & 96 — Federal Constitution arts 4(3), (4) & 128

The Malaysian Bar ('Bar') applied for leave to appeal under s 96 of the Courts of Judicature Act 1964 ('the CJA') against the decision of the Court of Appeal ('COA') in affirming the decision of the High Court ('HC') that dismissed the Bar's application for reference of 27 constitutional questions to the Federal Court pursuant to art 128 of the Federal Constitution ('the FC') and/or s 84 of the CJA. The HC dismissed the reference application, essentially on the ground that the questions raised were not constitutional questions that fell exclusively within the jurisdiction of the Federal Court alone to answer. On appeal, the COA affirmed the decision of the HC. One of the main grounds for dismissing the appeal was that the HC had not committed any appealable error in refusing to refer the questions posed, to the Federal Court. Dissatisfied, the Bar filed leave to appeal. The Bar proposed six questions of law ('QOL') ie: (a) whether in a reference under s 84(1) of the CJA read with art 128(2) of the FC, the proposition that only the Federal Court had the jurisdiction to determine a question as to the effect of any provision of the FC as held by the Federal Court in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 ('Gan Boon Aun') applied in view of the later decision of the Federal Court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 ('Anwar Ibrahim') that held that both the HC and the Federal Court had the jurisdiction to determine such questions ('QOL 1'); (b) whether the only matters that were within the jurisdiction of the Federal Court to warrant a reference under s 84(1) of the CJA were matters that related to questions of legislative competence under arts 4(3), 4(4) and 128(1) of the FC ('QOL 2'); (c) whether the matters that warranted determination in an application for reference under s 84(1) of the CJA read with art 128(2) of the FC were limited to the following: (i) whether the proposed constitutional questions in the proceedings at the HC related to the effect of any provision of the FC; and (ii) whether the determination of the proposed constitutional questions would result in the economical and speedy disposal of the proceedings at the HC

('QOL 3'); (d) whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law were matters that should be considered in determining an application for reference under s 84(1) of the CJA read with art 128(2) of the FC ('QOL 4'); (e) whether on a true interpretation of art 128(2) of the FC read with ss 81 and 84(1) of the CJA, the Federal Court could exercise the jurisdiction of the HC to decide whether the questions that related to the effect of the provisions of the FC could be determined by the Federal Court, without remitting the matter back to the HC ('QOL 5'); and (f) in the event QOL 5 was answered in the affirmative, whether the following questions that relate to the effect of the provisions of the FC should be referred to the Federal Court under ss 81 and 84(1) of the CJA read with art 128(2) of the FC for the Federal Court to determine 27 questions in the reference application ('QOL 6'). The QOL were divided into three main groups based on the commonality of the provisions of law in issue and the pith and substance points posited in the questions ie: (A) QOL 1 to 3 concerned the nature and scope of the reference of constitutional question in s 84 of the CJA read together with art 128(1) and (2), and with art 4(3) and (4) of the FC; (B) QOL 4 related to the alleged differences of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law as a factor to be considered in determining the reference application; and (C) QOL 5 to 6 dealt with the jurisdiction and power of the Federal Court in deciding the questions relating to the effect of the provisions of the FC without remitting the matter back to the HC.

Held, dismissing the application:

(1) There was no conflict, either latent or apparent, in the cases of *Gan Boon Aun*, *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh'), *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398 ('Khairul Azam'), and *Anwar Ibrahim*. The Federal Court in *Anwar Ibrahim* explained that the HC 'should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court' as there was no obligation on the part of the HC, by virtue of the word 'may' in s 84 of the CJA to refer any constitutional question arising before it to the Federal Court. Hence, the reference jurisdiction was not to be exercised automatically or invariably in every case. This understanding was consistent with *Gin Poh*, and *Khairul Azam*. In essence, where there was inconsistency challenge, the HC had the jurisdiction to decide on such constitutional challenge so premised. As such, when the HC exercised its discretion by not referring the 27 questions to the Federal Court because it was empowered to decide on them, that reason alone was valid and could find more than ample

support from the Federal Court decisions. The HC in such a circumstance could not then be said to have not exercised its discretion judicially or that it had not properly addressed its mind on the applicable test not to refer the constitutional questions to the Federal Court, when it had, in fact addressed its mind sufficiently to many authorities. QOL 1 to 3 failed to fulfil the necessary threshold for the grant of leave, in that, the meaning, nature and scope of reference to Federal Court was well established. The Bar failed to show that there existed a gap in the law that would necessitate the grant of leave for questions relating to the meaning and application of s 84 of the CJA read together with art 128(1) and (2), and art 4(3) and (4) of the FC (see paras 15–17). *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112

(2) The matters for consideration when determining the reference application had been explained in *Anwar Ibrahim* and it did not require any further ventilation on the terms as proposed in the QOL. The QOL 4, in the way it was currently framed was imprecise as to the 'principle' in question. Without sufficient precision in the framed QOL, it was not appropriate to venture to answer the question in the manner it was framed. Prima facie, therefore, QOL 4 did not merit the grant of leave (see paras 25 & 27).

(3) Section 81 of the CJA provided, inter alia, that the Federal Court 'shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court.' The word 'may' therein was clearly a permissive choice, implying some degree of discretion. Hence, the proposed QOL 5 and QOL 6 were not questions that fulfilled the necessary threshold for the grant of leave to appeal (see para 30).

[Bahasa Malaysia summary

Badan Peguam Malaysia ('Badan Peguam') memohon kebenaran merayu di bawah s 96 Akta Mahkamah Kehakiman 1964 ('AMK') terhadap keputusan Mahkamah Rayuan ('MR') yang mengesahkan keputusan Mahkamah Tinggi ('MT') yang menolak permohonan Badan Peguam untuk merujuk 27 persoalan perlembagaan kepada Mahkamah Persekutuan berdasarkan perkara 128 Perlembagaan Persekutuan ('PP') dan/atau s 84 AMK. MT menolak permohonan rujukan tersebut, pada dasarnya atas alasan bahawa persoalan yang dibangkitkan bukanlah persoalan perlembagaan yang secara eksklusif berada di bawah bidang kuasa Mahkamah Persekutuan sahaja untuk dijawab. Semasa rayuan, MR mengesahkan keputusan MT. Salah satu alasan utama untuk menolak rayuan itu ialah bahawa MT tidak melakukan sebarang kesilapan yang boleh dirayu dalam menolak untuk merujuk persoalan yang dikemukakan kepada Mahkamah Persekutuan. Tidak berpuas hati, Badan Peguam memohon kebenaran untuk merayu. Badan Peguam mencadangkan enam persoalan undang-undang ('QOL') iaitu: (a) sama ada dalam rujukan di bawah s 84(1) AMK dibaca bersama perkara 128(2) PP, cadangan bahawa

hanya Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan persoalan mengenai kesan mana-mana peruntukan PP seperti yang diputuskan oleh Mahkamah Persekutuan dalam *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265 ('Gan Boon Aun') terpakai memandangkan keputusan terbaru Mahkamah Persekutuan dalam *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 ('Anwar Ibrahim') yang memutuskan bahawa kedua-dua MT dan Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan persoalan sedemikian ('QOL 1'); (b) sama ada perkara-perkara yang hanya berada di bawah bidang kuasa Mahkamah Persekutuan yang mewajarkan rujukan di bawah seksyen 84(1) AMK adalah perkara yang berkaitan dengan persoalan keupayaan perundangan di bawah perkara 4(3), 4(4) dan 128(1) PP ('QOL 2'); (c) sama ada perkara-perkara yang mewajarkan penentuan dalam permohonan rujukan di bawah s 84(1) AMK dibaca bersama perkara 128(2) PP adalah terhad kepada yang berikut: (i) sama ada persoalan perlembagaan yang dicadangkan dalam prosiding di MT berkaitan dengan kesan mana-mana peruntukan PP; dan (ii) sama ada penentuan persoalan perlembagaan yang dicadangkan akan menghasilkan penyelesaian prosiding yang lebih ekonomik dan cepat di MT ('QOL 3'); (d) sama ada kewujudan perbezaan pandangan di Mahkamah Persekutuan mengenai pemakaian prinsip undang-undang perlembagaan atau keperlembagaan prinsip undang-undang adalah perkara yang perlu dipertimbangkan dalam menentukan permohonan rujukan di bawah s 84(1) AMK dibaca bersama perkara 128(2) PP ('QOL 4'); (e) sama ada berdasarkan tafsiran sebenar perkara 128(2) PP dibaca bersama s 81 dan 84(1) AMK, Mahkamah Persekutuan boleh menjalankan bidang kuasa MT untuk memutuskan sama ada persoalan yang berkaitan dengan kesan peruntukan FC boleh ditentukan oleh Mahkamah Persekutuan, tanpa mengembalikan semula kepada MT ('QOL 5'); dan (f) sekiranya QOL 5 dijawab secara afirmatif, sama ada persoalan berikut yang berkaitan dengan kesan peruntukan PP perlu dirujuk kepada Mahkamah Persekutuan di bawah s 81 dan 84(1) AMK dibaca bersama perkara 128(2) PP untuk Mahkamah Persekutuan dapat menentukan 27 persoalan dalam permohonan rujukan ('QOL 6'). QOL dibahagikan kepada tiga kumpulan utama berdasarkan persamaan peruntukan undang-undang yang dipersoalkan dan intipati serta perkara utama yang dikemukakan dalam persoalan iaitu (A) QOL 1 hingga 3 berkaitan dengan sifat dan skop rujukan persoalan perlembagaan dalam s 84 AMK dibaca bersama perkara 128(1) dan (2), serta artikel 4(3) dan (4) PP; (B) QOL 4 berkenaan dengan perbezaan pandangan yang didakwa di Mahkamah Persekutuan mengenai penerapan prinsip undang-undang perlembagaan atau keperlembagaan prinsip undang-undang sebagai faktor yang perlu dipertimbangkan dalam menentukan permohonan rujukan; dan (C) QOL 5 hingga 6 berkaitan dengan bidang kuasa dan kuasa Mahkamah Persekutuan dalam memutuskan persoalan yang berkaitan dengan kesan peruntukan PP tanpa mengembalikan semula perkara tersebut kepada MT.

Diputuskan, menolak permohonan: A

(1) Tiada percanggahan, sama ada tersembunyi atau nyata, dalam kes *Gan Boon Aun*, *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh'), *Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor* [2020] 1 MLJ 398 ('Khairul Azam'), dan *Anwar Ibrahim*. Mahkamah Persekutuan dalam kes *Anwar Ibrahim* menjelaskan bahawa MT 'seharusnya secara am dan biasa menentukan persoalan perlembagaan pada peringkat pertama, kecuali yang termasuk dalam bidang kuasa asal Mahkamah Persekutuan' kerana tiada kewajipan bagi pihak MT, berdasarkan perkataan 'boleh' dalam s 84 AMK untuk merujuk mana-mana persoalan perlembagaan yang berbangkit di hadapannya kepada Mahkamah Persekutuan. Oleh itu, bidang kuasa rujukan tidak perlu dilaksanakan secara automatik atau tetap dalam setiap kes. Pemahaman ini konsisten dengan *Gin Poh*, *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 dan *Khairul Azam*. Pada dasarnya, apabila terdapat cabaran ketidakseragaman, MT mempunyai bidang kuasa untuk memutuskan cabaran perlembagaan tersebut. Justeru, apabila MT menggunakan budi bicaranya dengan tidak merujuk 27 persoalan kepada Mahkamah Persekutuan kerana ia diberi kuasa untuk memutuskan persoalan tersebut, alasan itu sendiri sah dan dapat memperoleh sokongan yang mencukupi dari keputusan Mahkamah Persekutuan. Dalam keadaan sedemikian, MT tidak boleh dikatakan tidak menjalankan budi bicara secara adil atau tidak memberi perhatian sewajarnya kepada ujian terpakai untuk tidak merujuk persoalan perlembagaan kepada Mahkamah Persekutuan, apabila ia sebenarnya telah menanganinya secara secukupnya kepada banyak autoriti. QOL 1 hingga 3 gagal memenuhi ambang yang diperlukan untuk pemberian kebenaran, iaitu maksud, sifat dan skop rujukan kepada Mahkamah Persekutuan telah jelas ditetapkan. Badam Peguam gagal menunjukkan bahawa terdapat kekosongan dalam undang-undang yang memerlukan pemberian kebenaran untuk persoalan berkaitan makna dan pemakaian s 84 AMK yang dibaca bersama dengan perkara 128(1) dan (2), dan perkara 4(3) dan (4) PP (lihat perenggan 15–17). B C D E F G H

(2) Perkara untuk pertimbangan apabila menentukan permohonan rujukan telah dijelaskan dalam kes *Anwar Ibrahim* dan tidak memerlukan lagi penjelasan lanjut mengenai terma seperti dicadangkan dalam QOL. QOL 4, dalam cara ia dirangka adalah tidak tepat berkenaan 'prinsip' dalam persoalan. Tanpa ketepatan yang mencukupi dalam QOL yang dirangka, adalah tidak sesuai untuk cuba menjawab persoalan dalam cara ia dirangka. Prima facie, oleh itu, QOL 4 tidak layak untuk diberi kebenaran (lihat perenggan 25 & 27). I

(3) Seksyen 81 AMK memperuntukkan, antara lain, bahawa Mahkamah Persekutuan 'hendaklah mempunyai bidang kuasa yang sama dan boleh melaksanakan kuasa yang sama seperti yang dimiliki dan boleh dilaksanakan oleh Mahkamah Tinggi.' Perkataan 'boleh' di situ jelas merupakan pilihan permisif, menggambarkan beberapa tahap budi bicara. Oleh itu, QOL 5 dan QOL 6 yang dicadangkan bukanlah persoalan yang memenuhi ambang yang diperlukan untuk pemberian kebenaran untuk merayu (lihat perenggan 30).]

Cases referred to

Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)
Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad [2001] 2 MLJ 65, FC (refd)
Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor [2020] 4 MLJ 133; [2020] 3 CLJ 593, FC (refd)
Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application [1999] 1 MLJ 257, FC (refd)
Gan Boon Aun v PP [2016] 4 MLJ 265; [2016] 6 CLJ 647, FC (refd)
Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors [2018] 3 MLJ 417, FC (refd)
Mohd Khairul Azam bin Abdul Aziz v Menteri Pendidikan Malaysia & Anor [2020] 1 MLJ 398, FC (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 81, 84, 84(1), 96, 96(a), (b)
Federal Constitution arts 4, 4(3), (4), 128, 128(1), (2), 150, 150(2B), (3), (6)

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Rahazlan Affandi bin Abdul Rahim (with Liew Horng Bin and Nur Syazwani bt Abdul Aziz) (Federal Counsel, Attorney General's Chambers) for the respondents.

Abang Iskandar PCA:

THE FACTS AND THE ANTECEDENT PROCEEDINGS

[1] Malaysian Bar ('the Bar') in this case applied for leave to appeal under s 96 of the Courts of Judicature Act 1964 ('the CJA') against the decision of the Court of Appeal ('COA') in affirming the decision of the High Court ('HCT')

that dismissed the Bar's application for reference of 27 constitutional questions to the Federal Court pursuant to art 128 of the Federal Constitution ('the FC') and/or s 84 of the CJA. The first respondent is the then Prime Minister of Malaysia, and the second respondent is the Government of Malaysia (collectively as 'the respondents').

[2] The 27 questions can be broadly divided into six major categories dealing with:

(i) constitutionality of art 150 of the FC vis a vis the basic structure of the FC;

(ii) constitutionality of art 150(6) and (8) of the FC vis a vis arts 4, 5, 8 and 121 of the FC , and the basic structure of the FC;

(iii) constitutionality of the various provisions in the promulgated Emergency Ordinances vis a vis several articles in the FC;

(iv) the interpretation of art 150(3) of the FC on the constitutional duty of the respondents to forthwith advise the Yang di-Pertuan Agong ('YDPA') to summon a meeting of Parliament for: (i) the Proclamation of Emergency; and (ii) the various Emergency Ordinances, to be laid before both Houses of Parliament and for all necessary and appropriate resolutions to be passed;

(v) the interpretation of art 150(1) read with art 150(2B), (3) and (7) of the FC in respect of the power to revoke or annul the Emergency Ordinances; and

(vi) the interpretation of art 40(1) of the FC on the obligation of the YDPA to act on advice in respect of the continuance or revocation of Emergency Ordinances

[3] The first three categories (i) to (iii) are questions of constitutionality that are expressly stated to be inconsistent, either to (i) the basic structure of the FC, and/or (ii) the various Articles in the FC. In other words, it was never the case of the Bar that the 27 questions are premised on competency challenge.

[4] The HCT dismissed the reference application, essentially on the ground that those questions were not constitutional questions that fell exclusively within the jurisdiction of the Federal Court alone to answer. The challenge of constitutionality as mounted by the Bar on the inconsistency grounds pertained to matters that can be dealt with by the High Court following the decisions of the Federal Court in several cases, including *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 ('Ah Thian'); *Gin Poh Holdings Sdn Bhd (in voluntary liquidation) v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 ('Gin Poh'); *Mohd Khairul Azam bin Abdul Aziz v Menteri*

Pendidikan Malaysia & Anor [2020] 1 MLJ 398 ('Khairul Azam'); and *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133 ('Anwar Ibrahim').

[5] On appeal, the COA affirmed the decision of the HCT. One of the main grounds for dismissing the appeal was that the HCT had not committed any appealable error in refusing to refer the questions posed, to the Federal Court. The COA was of the view that on the inconsistency challenge such as the present case, the HCT was seized with the jurisdiction to hear and determine the matter. Notwithstanding, the COA viewed that the HCT 'retains a discretion to refer a question to the Federal Court under s 84 of the Courts of Judicature Act 1964 even in circumstances where the matter does not fall within the exclusive original jurisdiction of the Federal Court, but this discretion must be exercised sparingly'.

[6] Dissatisfied, the Bar filed leave to appeal. Originally, there were 32 proposed questions of law ('QOL') as stated in the notice of motion. However, the Bar had revised the QOL to six QOL only. One of the six revised QOL is directly concerned with the 27 reference questions mentioned above. The six revised QOL read:

(a) whether in a reference under s 84(1) of the Courts of Judicature Act 1964 read with Article 128(2) of the Federal Constitution, the proposition that only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Federal Constitution as held by the Federal Court in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647 applies in view of the later decision of the Federal Court in *Datuk Seri Anwar Ibrahim v Government of Malaysia & Anor* [2020] 4 MLJ 133; [2020] 3 CLJ 593 that held that both the High Court and the Federal Court have the jurisdiction to determine such questions?

(b) whether the only matters that are within the jurisdiction of the Federal Court to warrant a reference under s 84(1) of the Courts of Judicature Act 1964 are matters that relate to questions of legislative competence under arts 4(3), 4(4) and 128(1) of the Federal Constitution?

(c) whether the matters that warrant determination in an application for reference under s 84(1) of the Courts of Judicature Act 1964 read with art 128(2) of the Federal Constitution are limited to the following:

(i) whether the proposed constitutional questions in the proceedings at the High Court relate to the effect of any provision of the Federal Constitution; and

(ii) whether the determination of the proposed constitutional questions would result in the economical and speedy disposal of the proceedings at the High Court?

(d) whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law are matters that should be considered in determining an application for reference under s 84(1) of the Courts of Judicature Act 1964 read with art 128(2) of the Federal Constitution?

(e) whether on a true interpretation of art 128(2) of the Federal Constitution read with ss 81 and 84(1) of the Courts of Judicature Act 1964, the Federal Court can exercise the jurisdiction of the High Court to decide whether the questions that relate to the effect of the provisions of the Federal Constitution could be determined by the Federal Court, without remitting the matter back to the High Court? and

(f) in the event question 5 above is answered in the affirmative, whether the following questions that relate to the effect of the provisions of the Federal Constitution should be referred to the Federal Court under ss 81 and 84(1) of the Courts of Judicature Act 1964 read with art 128(2) of the Federal Constitution for the Federal Court to determine the said questions: (questions 1 to 27 in the reference application).

THE THRESHOLD FOR LEAVE

[7] The required threshold for leave to appeal had been settled by the Federal Court in *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications* [2011] 1 MLJ 25. There, the Federal Court accepted as correct, the principles laid down in *Datuk Syed Kechik bin Syed Mohamed & Anor v The Board of Trustees of the Sabah Foundation & Ors and another application* [1999] 1 MLJ 257.

[8] As observed in *Terengganu Forest*, an applicant, seeking leave to appeal has a heavy burden to discharge in proving the threshold under s 96 of the CJA, a specific provision regulating the conditions of appeal to the Federal Court. There are two situations where leave is required. They must be:

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and decision of the Federal Court would be to public advantage; or

(b) from any decision as to the effect of any provision of the Federal Constitution including the validity of any written law relating to any such provision.

A OUR DECISION

[9] We first identify under which limb of s 96 of the CJA that the proposed QOL could pass the required threshold. Limb (b) is, in our view, inapplicable as there is no decision yet made by the courts below on the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[10] As for limb (a), it must be shown to us that the proposed QOL involves a question of general principle decided for the first time or it being a question of importance to public advantage. In this regard, we are satisfied that the law on reference of constitutional questions to the Federal Court is well settled, requiring no further ventilation at the Federal Court. Our reasons are as set out below.

Analysis of the leave questions

[11] Having analysed the six revised QOL, we went on to divide those QOL into three main groups based on the commonality of the provisions of law in issue and the pith and substance points posited in those questions. They are:

(a) QOL 1 to 3 concern the nature and scope of the reference of constitutional question in s 84 of the CJA read together with art 128(1) and (2) and with art 4(3) and (4) of the Federal Constitution;

(b) QOL 4 relates to the alleged differences of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law as a factor to be considered in determining the reference application; and

(c) QOL 5 to 6 deal with the jurisdiction and power of the Federal Court in deciding the questions relating to the effect of the provisions of the FC without remitting the matter back to the HCT.

Nature and scope of reference to the Federal Court (QOL 1–3)

[12] First and foremost, we observed and it needs reiteration that the HCT in this case was aware of what was decided by the Federal Court in *Gan Boon Aun v Public Prosecutor* [2016] 4 MLJ 265; [2016] 6 CLJ 647 ('Gan Boon Aun') in that only the Federal Court is empowered to determine a question as to the effect of any provision of the Constitution, and that the HCT did not have such power.

[13] That said, the HCT acknowledged that the Federal Court had, in the later decisions in *Gin Poh, Khairul Azam* and *Anwar Ibrahim,* held that the HCT has the jurisdiction to deal with inconsistency challenges of the

constitutional provisions. With that understanding, the HCT refused the Bar's reference application.

[14] Reverting to the issue before us, the Bar seems to suggest that in view of the differences of opinion on reference to the Federal Court, between *Gan Boon Aun* on the one hand and *Anwar Ibrahim* on the other, there is the need for the Federal Court to clarify and state the correct position in law. In essence, the Bar is of the view that the nature and scope of the reference to the Federal Court are still vague and ambiguous. The respondents on the other hand argued that there is no conflict between *Gan Boon Aun* and *Anwar Ibrahim* on this matter and that the law relating to reference to Federal Court is well settled by the subsequent decisions of the Federal Court as mentioned above, with the latest decision being that of *Anwar Ibrahim*.

[15] We have examined *Gan Boon Aun, Gin Poh, Khairul Azam* and *Anwar Ibrahim*, and we found there is no conflict, either latent or apparent. The Federal Court in *Anwar Ibrahim* had clarified the law on reference to Federal Court. *Anwar Ibrahim* did not hold that only the constitutional questions premised on the competency challenge point can be referred to the Federal Court. Nevertheless, *Anwar Ibrahim* went on to explain that the HCT 'should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court' as there is no obligation on the part of the HCT, by virtue of the word 'may' in s 84 to refer any constitutional question arising before it to the Federal Court. Hence, the reference jurisdiction is not to be exercised automatically or invariably in every case. This understanding is consistent with *Gin Poh*, *Ah Thian* and *Khairul Azam*. In fact, Justice Azahar Mohamed CJ (Malaya) who penned the grounds of judgment in *Khairul Azam,* was one of the panel members in *Gan Boon Aun*. In essence, where there is inconsistency challenge, such as the present case, the HCT has the jurisdiction to decide on such constitutional challenge so premised.

[16] As such, when the HCT exercised its discretion by not referring the 27 questions to the Federal Court because it was empowered to decide on them, that reason alone was valid and could find more than ample support from the Federal Court decisions as cited and discussed above. The HCT in such a circumstance cannot then be said to have not exercised its discretion judicially or that it had not properly addressed its mind on the applicable test not to refer the constitutional questions to the Federal Court, when it had, in fact addressed its mind sufficiently to many authorities as cited in its judgment.

[17] In short, we are of the view that QOL 1 to 3 failed to fulfil the necessary threshold for the grant of leave, in that, the meaning, nature and scope of reference to Federal Court is well established and clarified in the authorities

cited above. The Bar had failed to show us that there existed a gap in the law that would necessitate the grant of leave for questions relating to the meaning and application of s 84 of the CJA read together with art 128(1) and (2), and 4(3) and (4) of the Federal Constitution.

[18] As was held in *Terengganu Forest*, 'the purpose of s 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right, particularly where the relevant laws are well settled.'

[19] Furthermore, *Anwar Ibrahim case* is a recent decision of this court and we do not see any cogent reason to depart from what to our mind is a sound and well-reasoned judgment, and deserving of due deference. In *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, this court ruled that:

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

Difference of views as a determining factor in reference application (QOL 4)

[20] At the risk of repetition, the proposed QOL 4 asks:

> Whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law are matters that should be considered in determining an application for reference under Section 84(1) of the Courts of Judicature Act 1964 read with Article 128(2) of the Federal Constitution?

[21] This proposed QOL revolves around the requisite factor to be considered in an application for reference. And the stated requisite proposed factor in the QOL is the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law.

[22] What had captured our attention when we first looked at the proposed QOL 4, had been the phrase 'a principle of constitutional law or the constitutionality of a principle of law'. Without the benefit of the parties' submissions, the QOL is rather vague and ambiguous. The QOL seems to suggest that the existence of a difference of views on the matters stated therein should be considered in determining the reference application.

[23] The Bar, in its submissions referred to two matters — the application of the doctrine of basic structure; and the ouster clause. These matters are what

the Bar submitted to be the factors to be considered in determining an application for reference as this apex court seems to have differing views on their application as well as their constitutionality. The respondents on the other hand argued that *Anwar Ibrahim* has ruled on the matters governing the reference application.

[24] The majority in *Anwar Ibrahim* whilst acknowledging that s 84 of the CJA does not expressly indicate the factors to be considered in determining whether a case is suitable to be referred to and determined by the Federal Court, it nevertheless ruled on the principles to be considered on the referral jurisdiction of the Federal Court. It held that:

> To summarise, the following principles should be borne in mind when considering the referral jurisdiction of the Federal Court:
>
> (a) the referral jurisdiction in art 128(2) of the FC and s 84 of the CJA forms part of the constitutional framework, and must be construed in its light;
>
> (b) the Federal Court is the court of last resort in respect of constitutional issues, except those falling within its narrowly construed original jurisdiction;
>
> (c) s 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a carte blanche for all constitutional questions to be referred to and determined by the Federal Court in every case. The High Court should normally determine constitutional questions themselves at first instance; and
>
> (d) where a special case is referred to the Federal Court under s 84, the Federal Court is not obliged to answer it in the terms posed, but retains a wide range of powers to deal with it in the same way as an appeal.

[25] Thus, based on the above, we agree with the respondents that the matters for consideration when determining the reference application has been explained in *Anwar Ibrahim* and it does not require any further ventilation on the terms as proposed in the QOL.

[26] Furthermore, even if there exists a difference of views on any matters at the apex court, the view that is most recently expressed by it would prevail. This court in *Dalip Bhagwan Singh* has given a clear pronouncement to that effect. As such, on what to consider in determining whether to refer constitutional questions to the Federal Court under s 84 of the CJA, *Anwar Ibrahim* is the latest authority.

[27] Importantly, as stated earlier, the proposed QOL, in the way it is currently framed is imprecise as to the 'principle' in question. The QOL ought to be clear so as to avoid leaving this court in a state of limbo, as to what it actually entails or seeks the Federal Court to answer. Without sufficient

A precision in the framed QOL, we do not think it is appropriate for us to venture to answer the question in the manner it is presently framed. Prima facie, therefore, QOL 4 does not merit the grant of leave.

To remit or not to remit is the question

B

[28] QOL 5 and 6 are new questions raised by the Bar for our determination. In essence, they concern the power of this court, when dealing with the reference application, to exercise its power under s 81 of the CJA, to decide the reference questions without remitting them back to the High Court.

C

[29] Firstly, we must highlight that the application of the cumulative reading of ss 81, 84 and art 128(2) of the FC was never an issue ventilated in the courts below. In any case, in respect of the power of this court in a s 84 reference, *Anwar Ibrahim* has provided us with the answer.

D

[30] As regards s 81 of the CJA, apart from spelling out the jurisdiction and powers of the Federal Court, to our mind, it states what is obvious. What it does not say is that, it does not obligate the Federal Court to answer any

E constitutional question referred to it, more so the inconsistency questions, although the Federal Court is clothed with the necessary jurisdiction similar to that of the High Court. We reproduce s 81 of the CJA which provides, *inter alia*, that the Federal Court 'shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court'. The word

F 'may' therein is clearly a permissive choice, implying some degree of discretion. Hence, the proposed QOL 5 and 6 are not questions that fulfilled the necessary threshold for the grant of leave to appeal.

Prima facie case for success

G

[31] One of the important factors for consideration in a leave application under s 96 of the CJA is whether there is a prima facie case for success in the appeal (*Dato' Seri Anwar Ibrahim v Dato' Seri Dr Mahathir Mohamad* [2001] 2 MLJ 65). In that case, the court explained that:

H

> In Datuk Syed Kechik bin *Syed Mohamed v The Board of Trustees of the Sabah Foundation* [1999] 1 MLJ 257 at p 265, this court held that the Federal Court grants leave to appeal from the Court of Appeal sparingly and will not grant such leave unless the following criteria are satisfied by the intending appellant: (i) the judgment of the Court of Appeal has raised a point of general principle which the

I Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (ii) if the point is decided in favour of the intending appellant, t*here is a prima facie case for success in the appeal*. Regarding the second criterion, the court observed (at p 262) that an assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into

account. It is however, not necessary for the intending appellant to demonstrate to the court the probability and a reasonable likelihood of the appeal succeeding in the event of leave being granted. All he needs to do is to show that on first impression, the appeal might succeed.

In our view, the question which we formulated above raises a question of general principle not previously decided by the Federal Court. It comes under the first criterion of s 96(a). However, *Datuk Syed Kechik* held that the two criteria of the section are not exclusive. *Hence, an assessment of the prospects of success should leave be granted is an important factor which the Federal Court would have to take into account.* On this point, we note that Mr Karpal merely deposed in his supporting affidavit that 'if any or all issues raised are decided in the applicant's favour, there is a prima facie case for success in the appeal.' There was no submission made on this point to demonstrate that there is a prima facie case for success in the appeal.

[32] In the present application for leave before us, neither the affidavit in support, nor the written or oral submissions filed by the Bar addressed this important factor on the prima facie case for success of the appeal. Hence, leave ought to be rejected.

CONCLUSION

[33] Our analysis of all the proposed QOL is that they are essentially proposing to us to relook into the meaning, application and scope of s 84 of the CJA, read with art 128(2) of the FC. In our view, *Anwar Ibrahim* and all the cited cases above had comprehensively dealt with the matter. We find that the Bar had failed to satisfy us as to where and what the gaps are in those cited cases to merit the grant of leave.

[34] In the upshot, we are of the unanimous view that the threshold requirement of s 96 of the CJA has not been met, with respect, by the Bar in this case, and as such, this leave application in encl 1 ought to be and is dismissed with no order as to costs.

Plaintiff's application allowed with no order as to cost.

Reported by Ahmad Ismail